

**BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001**

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

POSTAL RATE AND FEE CHANGES, 1997:

Docket No. R97-1

**PARCEL SHIPPERS ASSOCIATION MEMORANDUM OF LAW
ON THE ISSUE OF THE EVIDENTIARY VALUE OF
UNSPONSORED LIBRARY REFERENCES
(SEPTEMBER 17, 1997)**

The Commission has pending before it an NDMS Motion to Strike Portions Of The Testimony of Witness Fronk because that testimony relies upon a Library Reference (H-112) which, at this stage of the proceeding, is unsponsored by any witness and, so it would appear based on Postal Service pleadings, will not be sponsored during the course of this proceeding. Among other defenses the Postal Service has raised the question of whether the Motion to Strike is premature. The pleading at hand is neither in support of nor in opposition to the Motion to Strike, but, rather, is filed under the general Commission rubric that Memoranda of Law are always welcome. Parcel Shippers Association (PSA) urges the Commission to resolve the fundamental issues raised in the pleadings now and not later.

Parcel Shippers Association is similarly concerned, like NDMS, with the reliance of Postal Service witnesses upon Library Reference H-108, unsponsored as of this writing, but relied upon by several Postal Service witnesses to justify Postal Service's proposal to impose a 10 cent per piece surcharge on all Standard (A) non-letter, non-flat mail. At this point in time, it is not PSA's intention to move to strike the testimony of Postal Service witnesses that rely upon Library Reference H-108. Rather, we will argue, as we do here, that the testimony of Postal Service witnesses which rely on an undocumented study should be given little, if any, weight by the Commission. Such testimony is little more than hearsay.

PSA raised this question in Docket No. MC95-1, the Classification Reform proceeding, where another Library Reference study, for all we know the same study in an updated version as LRH-108 in this proceeding, was used by intervenor parties, most particularly United Parcel Service, to urge the Commission to impose a higher rate on Standard (A) parcels. The Commission may recall that PSA argued vigorously in that proceeding that there was no evidence to support a disproportionate cost

difference between Standard (A) flats and parcels; that the only evidence admitted into the record were USPS interrogatory responses and the testimony of a United Parcel Service witness who had reviewed and read the study. That witness, under oath, stated that he had no way to corroborate the study; did not know the authors of the study; had never discussed the methodology of the study with the authors; and finally could not vouch for the accuracy of the study's results. In fact, the witness' testimony was simply that he could vouch for the fact that the study itself stated that there was the alleged cost difference between Standard (A) parcels and flats. (See PSA Initial Brief, pp. 8-9, MC95-1.)

Despite PSA's challenge to the testimony; despite its arguments that the Library Reference was not in evidence; and that, therefore, there was no reliable evidence to support the alleged cost difference between parcels and flats, the Commission still made a finding of fact that "costs for parcels are significantly larger than for flats" in Standard (A), and, in a split vote, half of the Commissioners voted to impose a surcharge on parcels. (Opinion and Recommended Decision, MC95-1, V-226-227, and Dissenting Opinions.)


It is, thus, not an idle question as to what reliance the Commission will place upon unsupported Library References; particularly, in view of the fact that the Commission used an unsupported, unverified Library Reference to document a previous finding of a cost difference between Standard (A) parcels and flats that was shape-based, and disproportionate to the cost/revenue relationship.

It may be that it is the common wisdom that a parcel costs more than a flat to process and deliver, but, once again we are confronted with the situation, the third time in a row we would add, where there is no filed testimony in this proceeding by anyone who has actually conducted a study that demonstrated the alleged cost difference. Rather, we are for the third time faced with a situation where witnesses who have not conducted or participated in the study have filed testimony that they have seen the study and the study shows certain results. We think it is timely for the Commission to rule on whether it intends to violate its own rules in this proceeding, as it did in MC95-1, and use unverified, unsupported Library References as the basis for making findings in this proceeding.

One would have thought that it was not seriously an issue as to whether Library References constituted evidence. The Commission's own rules of Practice and Procedure state that: "Designation of a document as a Library Reference is a procedure for facilitating reference to the document in Commission proceedings and does not, by itself, confer any particular evidentiary status upon the document." And, Rule 5 of the Special Rules of Practice governing this particular proceeding is directly on point: "Library material is not evidence unless and until it is designated and sponsored by a witness."

If the Commission allows the Postal Service, or any other intervenor, for that matter, to avoid the responsibilities and burdens of producing evidence that meets the requisite standards of relevance, materiality and credibility, by insulating those who conduct studies from those rigorous tests, then it will have created one of the biggest catch 22's and one of the largest holes in the rules of proceeding before any regulatory agency in the history of administrative law.

Respectfully submitted,

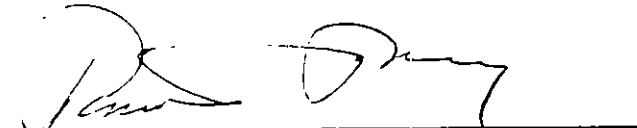


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Dated: September 17, 1997

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing upon all participants of record in this proceeding in accordance with Section 12 of the Rules of Practice.



Timothy J. May

Dated: September 17, 1997